

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION**

UNITED STATES OF AMERICA and)	
THE STATE OF WISCONSIN,)	Case Action No. 1:10-CV-00910
)	Hon. William C. Griesbach
Plaintiffs,)	
)	
v.)	
)	
NCR CORPORATION, et al.,)	
)	
Defendants.)	
)	

**CORRECTED DECLARATION OF DAVID A. RABBINO IN SUPPORT OF CERTAIN
DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT ON THE PROPRIETY OF THE REMEDY SOUGHT TO BE
ENFORCED IN THE FIFTH CLAIM FOR RELIEF AND CERTAIN DEFENDANTS'
CROSS-MOTION FOR SUMMARY JUDGMENT ON THE REMEDY SELECTED BY
THE PLAINTIFFS**

I, David A. Rabbino, declare:

1. I am a Shareholder with Hunsucker Goodstein PC. I am duly admitted to practice before the United States District Court for the Eastern District of Wisconsin. I am one of the attorneys representing Menasha Corporation ("Menasha") in this matter. The following facts are within my personal knowledge and, if called as a witness, I could and would testify competently thereto.

2. On March 31, 2011, the United States and the State of Wisconsin ("Plaintiffs") filed a Certificate of Service and Notice of Availability of Administrative Record Materials, Dkt. 128, and a corresponding index of the Site Administrative Record, Dkt. 128-1.¹

¹ Record citations to materials in the District Court docket are referenced in this Declaration by the docket number and page number applied by the District Court's Electronic Case Filing system ("Dkt. at").

3. On March 28, 2012, Plaintiffs filed a Certificate of Service and Second Notice of Availability of Administrative Record Materials, Dkt. 324, along with “Update 7” as a supplement to the March 31, 2011 index, Dkt. 324-1, and a combined index, Dkt. 324-2.

4. On August 8, 2012, Plaintiffs filed a Third Notice of Availability of Administrative Record Materials, Dkt. 474, along with “Update 8” as a supplement to the previous indices, Dkt. 474-1, and a combined index, Dkt. 474-2.

5. The Administrative Record also includes documents that are cited in the documents comprising the Certified Administrative Record. *See* Memorandum in Support of Plaintiffs’ Motion for Partial Summary Judgment on the Propriety of the Remedy Sought to Be Enforced in the Fifth Claim for Relief, Dkt. 509 at 21 n.9 (asserting that, “Although not separately indexed in the Administrative Remedy, the Optimized Remedy Design Memorandum is considered part of the Record for the Site by virtue of its inclusion in the bibliographic references for the BODR.”).

6. Unless otherwise specifically noted, all of the documents attached to this Declaration are included in the Certified Administrative Record, either because they are directly listed on the indices produced by Plaintiffs or because they are cited in support of one of the decisional documents included on Plaintiffs’ indices.

7. In 1995, the State of Wisconsin Department of Natural Resources (“WDNR”) and the U.S. Geologic Survey (“USGS”) issued a joint report, *Distribution and Transport of PCBs in Little Lake Butte Des Morts, Fox River, Wisconsin, April 1987-October 1988*, USGS Report 93-31 (1995) (“1995 USGS/WDNR Report”). The 1995 USGS/WDNR Report was included in the Certified Administrative Record at DOJ000710. A true and correct copy of excerpts of the 1995 USGS/WDNR Report from the Administrative Record is **Attachment 1** to this Declaration.

8. On July 3, 1997, David A. Ullrich, Acting Regional Administrator, Region 5, EPA, sent a Special Notice Letter to Fort Howard, Glatfelter, Wisconsin Tissue Mills, Inc., Riverside Paper Corp., U.S. Paper Mills Corp., Appleton Papers, Inc., and NCR Corporation. The Special Notice Letter was included in the Certified Administrative Record at EPAAR295624. A true and correct copy of the Special Notice Letter is **Attachment 2** to this Declaration.

9. On October 3, 1997, J. Andrew Schlickman, on behalf of the Fox River Group (“FRG”), sent a letter to Mr. James Hahnenberg, Region 5, EPA, regarding “Lower Fox River -- Good-Faith Offer to Conduct RI/FS.” The October 3, 1997 Letter was included in the Certified Administrative Record at EPAAR294370. A true and correct copy of the October 3, 1997 Letter is **Attachment 3** to this Declaration.

10. On December 11, 1997, David A. Ullrich, Acting Regional Administrator, Region 5, EPA, sent a letter to the members of the FRG regarding Section 122(e) Moratorium and Negotiation. The December 11, 1997 Letter was included in the Certified Administrative Record at EPAAR289927. A true and correct copy of the December 11, 1997 Letter is **Attachment 4** to this Declaration.

11. In July 1997, the Co-Trustees of the Site, which included the Department of the Interior acting through the U.S. Fish and Wildlife Service, the National Oceanic and Atmospheric Administration (“NOAA”) of the Department of Commerce, the Menominee Indian Tribe of Wisconsin, the Oneida Tribe of Indians of Wisconsin, the Michigan Attorney General, the Little Traverse Bay Bands of Odawa Indians, and EPA and WDNR formed the Intergovernmental Partnership and entered into a Memorandum of Agreement (“MOA”). The

MOA was not included in the Certified Administrative Record. A true and correct copy of the MOA is **Attachment 5** to this Declaration.

12. In September 1997, WDNR and a group of seven paper companies developed the *Workplan to Evaluate the Fate and Transport Models for the Fox River and Green Bay* (Sept. 19, 1997) (“*Model Evaluation Workplan*”). The *Model Evaluation Workplan* was included in the Certified Administrative Record at DOJEPAN060714. A true and correct copy of the *Model Evaluation Workplan* from the Administrative Record is **Attachment 6** to this Declaration.

13. As part of their execution of the tasks required by the *Model Evaluation Workplan*, WDNR and the group of seven paper companies developed *Technical Memorandum 1: Model Evaluation Metrics* (Mar. 13, 1998) (“*Tech Memo 1*”). *Tech Memo 1* was included in the Certified Administrative Record at DOJEPAN060728. A true and correct copy of *Tech Memo 1* from the Administrative Record has been filed at Dkt. 529-6.

14. In June 1999, the FRG submitted a document titled *Sensible Solutions for the Fox River: The Role of Nature and Technology in Restoring the Fox River While Preserving the Vitality of Our Communities, A Strategy for Restoring the River* (June 1999) (“*Sensible Solutions*”). *Sensible Solutions* was included in the Certified Administrative Record at WDNR040000453. A true and correct excerpt of a copy of *Sensible Solutions* from the Administrative Record is **Attachment 7** to this Declaration.

15. The FRG 1999 Report referenced a report authored by the U.S. Environmental Protection Agency (“EPA”), *Contaminated Sediment Management Strategy*, EPA-823-R-98-001 (1998). A copy of the EPA publication *Contaminated Sediment Management Strategy*, EPA-823-R-98-001 (1998), is **Attachment 8** to this Declaration.

16. On July 16, 1999, P. David Allen II of the U.S. Department of Interior (“DOI”) sent a letter to Jim Hahnenberg of EPA commenting on the RI/FS (the “*1999 DOI Letter*”). The *1999 DOI Letter* was included in the Certified Administrative Record at EPAAR162770. A true and correct copy of the *1999 DOI Letter* from the Administrative Record is **Attachment 9** to this Declaration.

17. On July 28, 1999, EPA and WDNR submitted the National Remedy Review Board Remedy Selection Briefing Package, LFR. A copy of the July 28, 1999 briefing package was included in the Certified Administrative Record at WDNR016001702. A true and correct copy of excerpts of the briefing package is **Attachment 10** to this Declaration. The National Remedy Review Board Briefing Package included as an exhibit a paper by James Hahnenberg entitled *Long-term Benefits of Environmental Dredging Outweigh Short Term Impacts* (May 17, 1999) (“*Hahnenberg Report*”) at WDNR006000027-29.

18. In October of 1999, The Northwestern published an article by Karl Ebert entitled *Fox River Group takes issue with DNR again*, in which Bruce Baker explained why WDNR refused to take part in a forum conducted by the National Research Council on dredging. The text of the October 1999 article is contained within an October 18, 1999 email, which was included in the Certified Administrative Record at EPAAR158609-12. A true and correct copy of the email containing the article is **Attachment 11** to this Declaration.

19. On March 2, 2000, James E. Doyle of WDNR sent a letter to David Mandelbaum, in which WDNR acknowledged that dredging in SMU 56/57 had “left the river in a vulnerable and damaged state.” The Certified Administrative Record includes a copy of the March 2, 2000 letter at EPAAR155162. A true and correct copy of the March 2, 2000 Letter from Mr. Doyle to Mr. Mandelbaum is **Attachment 12** to this Declaration.

20. On March 31, 2000, David Mandelbaum sent a letter to Roger Grimes of EPA, stating that dredging done in SMU 56/57 often left higher surface concentrations after dredging than before and that dredging would not reduce risk at the levels predicted. The Certified Administrative Record includes a copy of the March 31, 2000 letter from Mr. Mandelbaum to Mr. Grimes at EPAAR155146. A true and correct copy of excerpts of the March 31, 2000 letter from the Administrative Record is **Attachment 13** to this Declaration.

21. In March of 2000, the Fox River Group submitted a report entitled *Effectiveness of Proposed Options for Additional Work at SMU 56/57* (“*March 2000 Report*”). The Certified Administrative Record includes a copy of the *March 2000 Report* at EPAAR155250. A true and correct copy of excerpts of the *March 2000 Report* is **Attachment 14** to this Declaration.

22. On June 2, 2000, The Capital Times published an article by Krishna Ramanujan entitled *Dioxin, PCB Effect Probed at UW Forum*. The June 2, 2000 article was included in the Certified Administrative Record at EPAAR290210-11. A true and correct copy of the article is **Attachment 15** to this Declaration.

23. On June 5, 2001, Paul Rasmussen, a WDNR statistician, wrote a memorandum to Gregory Hill and Mark Velleux of WDNR “Estimating trends in Lower Fox River sediment PCB concentrations” (“*Rasmussen Memo*”). The *Rasmussen Memo* was included in the Certified Administrative Record at WDNR059002314. A true and correct copy of the *Rasmussen Memo* is **Attachment 16** to this Declaration.

24. In October 2001, WDNR and EPA released the *Proposed Remedial Action Plan: Lower Fox River and Green Bay* (the “*PRAP*”). The *PRAP* was included in the Certified Administrative Record at WDNR043002560. A true and correct copy of an excerpt of the *PRAP* from the Administrative Record has been filed at Dkt. 507-13.

25. On January 18, 2002, the Michigan Department of Environmental Quality submitted Comments on the Fox River Proposed Remedial Action Plan. The January 18, 2002 comments of the Michigan Department of Environmental Quality were included in the Certified Administrative Record at EPAAR296014-EPAAR296027. A true and correct copy of the Comments is **Attachment 17** to this Declaration.

26. On January 22, 2002, the FRG submitted comments on the Proposed Remedial Action Plan for the Lower Fox River and Green Bay ("*FRG 2002 Comments*"). The *FRG 2002 Comments* were included in the Certified Administrative Record at EPAAR298634-9003. A true and correct excerpt of the Comments is **Attachment 18** to this Declaration.

27. Exhibit 5 to the *FRG 2002 Comments* was an *Evaluation of WDNR Fate and Transport and Food Web Models for the Lower Fox River and Green Bay System* (Jan. 2002) by the FRG consultant, Limno Tech, Inc. ("LTI") ("*2002 Model Evaluation*"). The *2002 Model Evaluation* was included in the Certified Administrative Record at WDNR012000467/EPAAR299576. A true and correct copy of excerpts of the *2002 Model Evaluation* is **Attachment 19** to this Declaration.

28. In December 2002, WDNR and EPA released the *Remedial Investigation Report for the Lower Fox River and Green Bay Site, Wisconsin* (December 2002) ("*RI Report*"). The *RI Report* was included in the Certified Administrative Record at WDNR060002761. A true and correct copy of an excerpt of the *RI Report* is **Attachment 20** to this Declaration.

29. In December 2002, WDNR and EPA released the *Lower Fox River and Green Bay Remedial Investigation and Feasibility Study* ("*Final FS*"). The *Final FS* was included in the Certified Administrative Record at WDNR060001040 (Vol. 1) & WDNR060001784 (Vol. 2). A true and correct copy of excerpts from the *Final FS* from the Administrative Record has

been filed at Dkt. 507-5 to 507-8 and additional excerpts are in **Attachment 32** to this Declaration.

30. Appendix B to the *Final FS* was the *Sediment Technologies Memorandum* (Dec. 2002) (“*Sediment Technologies Memo*”). The *Sediment Technologies Memo* was included in the Certified Administrative Record at WDNR060001797. A copy of the *Sediment Technologies Memo* has been filed at Dkt. 439-1 to 439-3.

31. Contemporaneous with the Final FS, WDNR released the *Final Model Documentation Report for the Lower Fox River and Green Bay, Wisconsin* (Dec. 2002) (“*Model Documentation Report*”). The *Model Documentation Report* was included in the Certified Administrative Record at DOJEPAN060667 (Vol. 1) and DOJEPA061900 (Vol. 2). An excerpt of the *Model Documentation Report* has been filed at Dkt. 439-14.

32. Appendix B1 to the *Model Documentation Report* was the *Development and Application of a PCB Transport Model for the Lower Fox River* (June 15, 2001) (“*wLFRM Model Documentation Report*”). The *wLFRM Model Documentation Report* was included in the Certified Administrative Record at DOJEPAN062210. An excerpt of the *wLFRM Model Documentation Report* is **Corrected Attachment 21** to this Declaration.

33. Appendix D1 to the *Model Documentation Report* was the *FRFood Model Documentation Memorandum* (June 2001) (“*FRFood Model Report*”). The *FRFood Model Report* was included in the Certified Administrative Record at DOJEPAN062846. A true and correct copy of an excerpt of the *FRFood Model Report* from the Administrative Record is **Attachment 22** to this Declaration.

34. The *FRFood Model Report* cites F.A.P.C. Gobas, *A model for predicting the bioaccumulation of hydrophobic organic chemicals in aquatic food-webs: Application to Lake*

Ontario, 69 Eco. Modeling, 1-17 (1993) (“1993 Gobas Model Documentation”). A copy of the 1993 Gobas Model Documentation is **Attachment 23** to this Declaration.

35. Appendix F to the *Model Documentation Report* is listed in the table of contents as: *Lower Fox River/Green Bay Model Documentation, Inputs & Results* (July 13, 2001) (“*LFRGB Model Inputs & Results*”). Only the cover page for the *Model Inputs & Results* was included in the Certified Administrative Record (at DOJEPAN063144). A true and correct copy of this page from the Administrative Record is **Attachment 24** to this Declaration. Also included in **Attachment 24** are two “screen shots” from the discs containing the modeling files and codes that shows the temperature input parameter for the model was set at 20°C (68°F) and the log K_{ow} value input parameter for the model was set at 6.6.

36. Appendix E1 to the *Model Documentation Report* was *A Model of PCB Bioaccumulation in the Lower Fox River and Green Bay: GBFood* (June 2001) (“*GBFood Model Report*”). The *GBFood Model Report* was included in the Certified Administrative Record at DOJEPAN062934. A true and correct copy of an excerpt of the *GBFood Model Report* from the Administrative Record is **Attachment 25** to this Declaration.

37. In 2002, WDNR and EPA released the *Record of Decision: OU 1 and OU 2: Lower Fox River and Green Bay, Wisconsin* (“2002 ROD”). The 2002 ROD was included in the Certified Administrative Record at WDNR124002696. The 2002 ROD has been filed at Dkt. 439-12.

38. Contemporaneously with the 2002 ROD, WDNR and EPA released the *Responsiveness Summary: Lower Fox River and Green Bay, Wisconsin Site: ROD OUs 1 and 2* (Dec. 2002) (“2002 Responsiveness Summary”). The 2002 Responsiveness Summary was

included in the Certified Administrative Record at WDNR124002840. The 2002 *Responsiveness Summary* has been filed at 507-14 and 507-15.

39. In June 2003, WDNR published White Paper 22, *Remedial Decision-Making for the Lower Fox River/Green Bay RI/FS, PRAP and ROD for Operable Units 3 through 5*. A copy of White Paper 22 was included in the Certified Administrative Record at EPAAR001440. A true and correct copy of an excerpt of White Paper 22 is **Attachment 26** to this Declaration.

40. In November 2003, WDNR and EPA released the *Detailed Evaluation of Alternatives* (Nov. 2003). The *Detailed Evaluation of Alternatives* was included in the Certified Administrative Record at EPAAR277407/EPAAR291381. A true and correct copy of an excerpt of the *Detailed Evaluation of Alternatives* is **Attachment 27** to this Declaration.

41. The *Detailed Evaluation of Alternatives* cited the *EPA Guidance: A Guide to Developing and Documenting Cost Estimates During the Feasibility Study*, EPA-540-R-00-002, OSWER 9355.0-75, (July 2000) (“*EPA Cost Estimate Guidance*”). A true and correct copy of the *EPA Cost Estimate Guidance* is **Attachment 28** to this Declaration.

42. In 2003, WDNR and EPA released the *Record of Decision: OUs 3, 4, and 5, Lower Fox River and Green Bay, Wisconsin* (“2003 ROD”). The 2003 ROD was included in the Certified Administrative Record at WDNR124002129 and has been filed at Dkt. 404-2.

43. In 2006, Fort James Operating Company, Inc. and NCR Corporation submitted the *Final Basis of Design Report: Lower Fox River and Green Bay Site* (June 16, 2006) to WDNR and USEPA (“*BODR*”). The *BODR* was included in the Certified Administrative Record at EPAAR176732 and an excerpt has been filed at Dkt. 439-7, and additional excerpts are in **Attachment 33** to this Declaration.

44. As part of the *BODR*, Ft. James Operating Co., Inc. and NCR Corp. submitted the *Lower Fox River Baseline Monitoring Plan* (June 23, 2006) to WDNR and USEPA (“*Baseline Monitoring Plan*”). The *Baseline Monitoring Plan* was included in the Certified Administrative Record at EPAAR260688. A true and correct copy of an excerpt of the *Baseline Monitoring Plan* from the Administrative Record is **Attachment 29** to this Declaration.

45. In 2007, WDNR and USEPA released the *Record of Decision Amendment: OU 2 (Deposit DD), OU 3, OU 4, and OU 5 (River Mouth): Lower Fox River and Green Bay Superfund Site* (June 2007) (“*2007 ROD Amendment*”). The *2007 ROD Amendment* was included in the Certified Administrative Record at EPAAR180105 and has been filed at Dkt. 404-3.

46. Contemporaneously with the *2007 ROD Amendment*, WDNR and USEPA released the *Responsiveness Summary OU 2 (Deposit DD), OU 3, OU 4, and OU 5 (River Mouth): Lower Fox River and Green Bay Superfund Site* (June 2007) (“*2007 Responsiveness Summary*”). The *2007 Responsiveness Summary* was included in the Certified Administrative Record at EPAAR180157 and has been filed at Dkt. 507-19.

47. On November 19, 2007, certain potentially responsible parties submitted a Concept Paper entitled *Lower Fox River Site, OU-1 Optimized Remedy*. The Certified Administrative Record includes a copy of the November 19, 2007 Concept Paper at EPAAR173744-67. A true and correct copy of the Concept Paper is **Attachment 30** to this Declaration.

48. In 2010, WDNR and USEPA released the *Explanation of Significant Differences: OU 2, OU 3, OU 4, and OU 5 (River Mouth) Lower Fox River and Green Bay Site* (Feb. 2010)

(“2010 ESD”). The 2010 ESD was included in the Certified Administrative Record at EPAAR185211 and has been filed at Dkt. 147-1.

49. Contemporaneously with the 2010 ESD, WDNR and USEPA released the *Criteria Analysis Memorandum: OU 2 (Deposit DD), OU 3, OU4, and OU 5 (River Mouth), Lower Fox River and Green Bay Superfund Site* (Feb. 2010) (“2010 CAM”). The 2010 CAM was included in the Certified Administrative Record at EPAAR185227 and has been filed at Dkt. 147-2.

50. In response to the 2010 ESD and accompanying 2010 CAM, Menasha filed comments with the USEPA, which were included in the Certified Administrative Record at EPAAR188382 (“Menasha’s 2010 Comments”). A true and correct copy of Menasha’s 2010 Comments is **Attachment 31** to this Declaration.

51. On April 12, 1999, the FRG submitted Volume 1 *Comments of the Fox River Group on the Wisconsin Department of Natural Resources’ Draft Remedial Investigation, Baseline Human Health and Ecological Risk Assessment and Draft Feasibility Study for the Lower Fox River* (“April 12, 1999, FRG Comments on RI/FS, Vol. 1”). The April 12, 1999, FRG Comments on RI/FS, Vol. 1 was included in the Certified Administrative Record at WDNR020000181. A true and correct copy of excerpts of the April 12, 1999, FRG Comments on RI/FS, Vol. 1 is **Attachment 34** to this Declaration.

I declare under the penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this declaration was executed on October 9, 2012, at Lake Oswego, Oregon.

By: s/ David A. Rabbino
David A. Rabbino